

Express Messenger Systems, Inc. and Karl Haas.
Case 20-CA-22569

February 8, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On June 29, 1990, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Express Messenger Systems, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

“1. Cease and desist from

“(a) Disciplining its employees for disseminating information concerning protections and benefits available to them by virtue of their employment and urging them to take actions designed to secure such protections and benefits.

“(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the attached notice for that of the administrative law judge.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²With respect to part II, B.2 of the judge's decision, we find that the Respondent's supervisor Lawson Lloyd's order to employee Karl Haas to get out, in the context of their preceding exchange of statements, establishes that Haas was discharged by the Respondent, and that he did not voluntarily quit.

In addition, we note that the duration of the collective-bargaining agreement in this case was from July 18, 1988, to July 17, 1990.

³The judge inadvertently failed to include certain standard injunctive language in the Order. We have corrected this omission by adding a narrow cease-and-desist provision and have otherwise conformed the provisions of the notice to those of the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline you for disseminating information about protections and benefits available to you as an employee and urging any coworker or coworkers to take action designed to secure those protections and benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate reinstatement to Karl Haas to his former position or, if that position no longer exists, to a substantially equivalent position, with all rights, benefits, and seniority restored and WE WILL make him whole for any loss of earnings and other benefits he suffered by virtue of our discrimination against him for advising a coworker of the rights, benefits, and protections she would be entitled to under the collective-bargaining agreement between us and Teamsters Local 665 on completion of her probationary period and urging her to remain in our employ until she completed her probationary period.

WE WILL notify Karl Haas that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

EXPRESS MESSENGER SYSTEMS, INC.

Donald R. Rendall, Esq., for the General Counsel.
Ned A. Fine (Fisher & Phillips), of San Francisco, California, for Express Messenger.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On March 20, 1990, I conducted a hearing at San Francisco, California, to try issues raised by a complaint issued on May

30, 1989,¹ based on a charge filed by Karl Haas, an individual, on March 31, 1989.

The complaint alleged and Express Messenger Systems, Inc. (Respondent) in its answer denied the Respondent discharged Haas because he engaged in activities for employee aid or protection and to discourage employees from engaging in such activities, thereby violating the National Labor Relations Act (the Act).

In its answer to the complaint, the Respondent alleged at times material Haas was a supervisor within the meaning of the Act, Haas was not discharged but voluntarily quit his employment and, if discharged, Haas was not discharged for engaging in concerted activities protected by the Act.

The issues for resolution are whether:

1. At times pertinent Haas was a supervisor within the meaning of the Act;
2. If not, whether Haas voluntarily quit his employment or was discharged; and
3. If he was discharged, if he was discharged for engaging in concerted activities protected by the Act.

Counsels were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, to argue, and to file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT²

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted and I find at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and Teamsters Automotive Employees Local No. 665, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (the Union) was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

At all relevant times the Respondent, a Minnesota corporation, has maintained a facility and employed a work force at San Francisco, California, in conducting its business, supplying message and courier services to individuals and business entities.

After an election conducted by the National Labor Relations Board (the Board), within a stipulated unit of the Respondent's employees,³ the Respondent and the Union executed a collective-bargaining agreement on July 19 for a 1-

year term commencing July 18 and expiring July 17, 1990. Under the terms of that agreement:

1. The Respondent recognized the Union as the exclusive collective-bargaining representative of its full-time and regular part-time driver and biker messengers and excluded its dispatchers and walker messengers from coverage under the agreement and union representation.

2. All employees covered by the agreement were denied seniority protection, receipt of fringe benefits (paid vacations, health insurance), protection against arbitrary discharge and access to the grievance/arbitration procedures established under the agreement until and unless they completed a 90-day probationary period.

3. The employees covered by the agreement were paid a percentage of the Respondent's charge for pickups and deliveries except under specified conditions, when they were paid a flat rate.

4. The messengers were required to furnish their own vehicles (bikes or autos) and rent radios from the Respondent.

The walker and biker messengers made pickups and deliveries within the central business area of San Francisco; the driver messengers handled pickups and deliveries outside that area.

During times pertinent,⁴ the greatest volume of Respondent's business was conducted during daytime hours between Monday and Friday (though the Respondent maintained a skeleton operation outside those hours to service its customers). The driver dispatch board was manned during all hours the Respondent conducted operations and the dispatcher or dispatchers manning that board handled all dispatches, including driver, biker, and walker dispatches, outside the Monday-Friday daytime working hours. During the Monday-Friday daytime working hours, in addition to the driver dispatchers, the Respondent employ a dispatcher to man the walker dispatch board and a dispatcher to man the biker dispatch board and a relief dispatcher to handle the walker and biker dispatch boards during the early morning hours (before the two regular dispatchers came on duty), to relieve and assist regular walker and biker dispatchers during the balance of his shift, and to perform other duties (hereafter described). The Respondent required the dispatchers to follow a first-in first-out policy in parceling out work assignments, unless a messenger happened to be present near a location where a rush order came in for priority handling.

Lawson Lloyd closely supervised the work of the biker messengers and dispatchers during Monday-Friday daytime working hours in the first quarter of 1989, controlling about 15 biker messengers and 3 dispatchers. He possessed and exercised the power to hire and fire bike messengers and dispatchers, review their work performance, handle their complaints and requests and, when circumstances warranted, man the dispatch board.⁵

Haas was hired by the Respondent as a biker messenger on January 19. After a short time, Lloyd promoted him to the position of relief biker dispatcher, covering the early morning walker/biker messenger dispatch function and relieving regular walker and biker messenger dispatchers during the balance of his shift. In addition to those duties, Haas

¹ Read 1989 after further date references omitting the year.

² While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is discredited.

³ All full-time and regular part-time driver and biker messengers employed by the Employer at its San Francisco, California facility; excluding all other employees, dispatchers, walkers, office clerical employees, guards and supervisors as defined in the Act.

⁴ The first quarter of 1989.

⁵ The complaint alleged, the answer admitted, and I find at all pertinent times Lloyd was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

from time to time utilized his bike to make pickups and deliveries, manned a telephone for the purpose of pacifying complaining customers (troubleshooting), ran errands, and did paperwork. He was placed on salary status following his promotion.

Neither Lloyd nor any other Respondent manager told Haas he was authorized or empowered to hire, fire, discipline, transfer, reward, promote, layoff, or recall any other employee, to adjust employee grievances, or to effectively recommend any of those actions; nor did Haas at any time hire, fire, discipline, transfer, reward, promote, lay off, or recall any other employee, or adjust an employee grievance.

From time to time Haas interviewed applicants for biker messenger jobs referred to him by Respondent's personnel department. He recommended a number of applicants not be hired (one known to him as a thief and others who appeared to be substance abusers). Every negative recommendation he made was rejected and the applicants hired.

Per Lloyd's instructions, Haas occasionally completed forms furnished by Respondent when a bike messenger was late in reporting for work or deficient in his or her work performance and forwarded the forms to the Respondent's personnel department. There was no evidence the reports ever resulted in any action affecting job status, or any evidence of any action absent an independent review and evaluation of the reports.

On occasion while dispatching, in the absence of or receipt of few incoming work orders, Haas told a bike messenger he or she could go home before the end of his or her workshift. On other occasions a messenger who noted no or few incoming orders were coming in informed Haas the messenger was going home prior to the end of the workshift and did so, without admonition from Haas.

On occasion Lloyd asked Haas how a messenger was doing and Haas voiced his opinion of the messenger's work performance; there was no evidence Lloyd ever took any action affecting the employee's job status on the basis of Haas' opinion or without an independent evaluation of the employee's work performance.

On occasion while dispatching, Haas told a messenger he was taking too long to complete an assignment and to "cut it out"; there was no evidence such admonitions were ever reported to Lloyd or to the Respondent's personnel department, nor that they affected the messenger's job status.

In negotiations preceding the execution of the agreement, a member of the Union's bargaining committee representing biker messengers asked the spokesman for the Respondent's bargaining committee if the Respondent's biker dispatchers had the authority or power to fire and was told they were not so authorized or empowered; the union committeeman then asked if the dispatchers had the authority or power to hire and again received a negative reply.

The only evidence of union activity or advocacy by Haas occurred in mid-March, when Haas, in a conversation with biker messenger Colleen Finnegan at his home, advocated biker messengers employed by the Respondent and by other employers in the area in the same business form a labor organization separate from the driver and walker messengers, to secure better wages and working conditions. There was no evidence Lloyd or any other Respondent manager heard or were aware of those comments or Haas' views expressed to Finnegan.

Haas' employment by Respondent ended on March 30 after verbal exchanges between Lloyd and Haas, following the conclusion of a conversation between Finnegan and Haas at the dispatch room.

Finnegan approached Lloyd outside of Haas' presence and stated she was concerned over her job status, based on the fact her work assignments had decreased substantially since her return after a 1-week, unpaid vacation. Lloyd responded the situation in the Respondent's biker messenger service operation was chaotic and he was trying to weed out undesirables. Finnegan asked if she was one of the undesirables. Lloyd replied to the contrary, she was one of his star biker messengers and she had no reason to worry about retaining her job. Finnegan stated she nevertheless was not earning enough to support herself and was uncertain about whether to continue to work for the Respondent or to seek other employment. Lloyd suggested, rather than quitting her job, she take a leave of absence while she considered what she was going to do. Finnegan accepted Lloyd's suggestion, the two went to Respondent personnel department, Finnegan executed a request for a leave of absence, Lloyd approved the request, and it was handed over to the personnel department for appropriate recording.

Finnegan then proceeded, alone, to the dispatch office to turn in her radio.

On arriving at the dispatch office, Finnegan turned her radio over to Haas. He asked her what was happening and she related the details of her conversation with Lloyd and her acceptance of his advice that she secure a leave of absence while she decided whether to remain in Respondent's employ or secure other employment. Haas asked her if she had completed the 3-month probationary period required by the Respondent-Union agreement to secure the protections and benefits set out in that agreement. She was unsure, so the two consulted a calendar and determined she needed a few more days on the job to complete her probationary period. Haas described the benefits and protections she would be entitled to under the agreement after completion of her probationary period, especially the seniority provision,⁶ urged her to delay taking any leave until she completed her probationary period and told her Lloyd did not have her best interests in mind when he advised she take a leave of absence at this time and had lied to her.⁷

Lloyd entered the dispatch room while Haas and Finnegan were conversing and overheard the conversation. On its completion, Lloyd told Haas he was close to firing Haas for what he was saying to Finnegan. Haas replied he was advising Finnegan of her rights and expressing his dismay at Lloyd's lying about what was going on. Lloyd told Haas if he did not like the way he was running the business, Haas could leave. Haas responded fine, he was going to quit anyway and was only hanging on until he qualified for health benefits and had some dental work done, and walked away from Lloyd while declaiming, in a loud voice (and before other

⁶Haas knew Lloyd was developing a plan to hire and station additional walker messengers at various locations in the city and utilize a van to service those locations, enabling the walker messengers to handle a much larger proportion of the Respondent's deliveries and pickups in the inner city, at the same time substantially reducing if not eliminating the use of biker messengers.

⁷Apparently, in Haas' opinion, by telling Finnegan she need not fear losing her job, in view of Lloyd's plan to increase the use of walker messengers and decrease or eliminate the use of biker messengers.

employees), management was bleeding its employees, firing them before they could qualify for their benefits. Lloyd at that point ordered Haas to get out and he did.

The Respondent has not reinstated Haas since leaving the Respondent's premises following Lloyd ordering him to get out.

B. Analysis and Conclusions

1. Supervisor

a. The Act

Under Section 2(11) of the Act, a supervisor is "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment."

The party asserting an employee is a supervisor within the meaning of Section 2 has the burden of establishing by sufficient proof the job functions of the employee in question satisfy the requirements of that Section.⁸

b. Authority

No evidence was adduced establishing Lloyd or any other Respondent manager told Haas he was authorized in Respondent's interest to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances. To the contrary, it was established Haas never was told he was so authorized.

The Board and courts reviewing its decisions frequently have held in the absence of such authorization, dispatchers and employees similarly employed were not supervisors within the meaning of Section 2(11).⁹

c. Effective recommendations

It was established from time to time the Respondent's personnel department referred applicants for biker messenger positions to Haas for his opinion concerning their qualifications. It was further established, however, Haas' negative opinions or recommendations regarding prospective hires were uniformly and without exception rejected and those applicants hired by the person authorized by the Respondent to hire.

It was also established from time to time Lloyd solicited Haas' opinion of the work performances of various biker messengers. It was not established, however, Lloyd ever took any action affecting the job status of any messenger about whose performance he solicited Haas' opinion or recommendation.

⁸*National Livery Service*, 281 NLRB 698 (1986); *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985); cases cited in those decisions.

⁹*Bay Area-Los Angeles Express*, supra; *George C. Foss Co.*, 270 NLRB 232 (1984), enf. 752 F.2d 1407 (9th Cir. 1985); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *United Services for the Handicapped*, 251 NLRB 823 (1980); *Western Union Co.*, 242 NLRB 825 (1979); *Southwest Airlines*, 239 NLRB 1253 (1979); *Hankamer Ready Mix Concrete*, 234 NLRB 608 (1978); *Interstate Motor Freight System*, 227 NLRB 1167 (1977); *Eastern Greyhound Lines*, 138 NLRB 8 (1962).

It was further established Haas, pursuant to Lloyd's instructions, completed and forwarded to the Respondent's personnel department forms noting biker messengers' tardiness and faulty job performances. It was not established, however, the job status of any employee named in those reports was affected thereby or that Haas had any voice or role in any decision affecting the named employees' job status, if any such decision was made.

The Board and reviewing courts regularly have held such evidence fails to establish a dispatcher or similarly situated employee effectively recommended any of the actions set out in Section 2 and therefore was a supervisor within the meaning of Section 2(11).¹⁰

d. Use independent judgment in assigning and directing employees

It was established Haas spent a substantial portion of his workday dispatching biker messengers to pick up and deliver packages, documents, etc. for customers located in the central part of the city. For the most part, those dispatches involved following a set pattern; i.e., directing the first messenger who reported in to make the first pickup and delivery requested by a customer, directing the second messenger who reported in to make the second, etc., slotting messengers into the sequence as they completed assignments. On a few occasions (such as receipt of a rush request at a premium charge from a customer and a messenger who had completed an assignment was in the immediate vicinity of the rush pickup or delivery, Haas departed from the set pattern, again according to Respondent's instructions and practice, and radioed that messenger to make the pickup or delivery). Haas also handled assignment of break and lunchtimes, advice on locations and travel routes, etc., and advised messengers they were free to quit work prior to their normal quitting times when there was an adequate supply of messengers to handle the work during slack periods, as well as acknowledge reports from messengers they were quitting work prior to their normal quitting times when they were awaiting but not receiving any assignments due to a lack of customer orders.

Certainly the performance of these dispatching duties by Haas required he assign and direct messengers in the interest of the Respondent; I find, however, the exercise of those functions occurred within parameters established by the Respondent and did not require a sufficient exercise of independent judgment to satisfy Section 2(11) of the Act's definition of a supervisor.¹¹

¹⁰*Bay Area-Los Angeles Express*, supra; *George C. Foss Co.*, supra; *B. P. Oil, Inc.*, 256 NLRB 1107 (1981); *Hydro Conduit Corp.*, supra; *United Services for the Handicapped*, supra; *Fisher Foods, Inc.*, 245 NLRB 685 (1979); *Southwest Airlines*, supra; *John Cuneo of Oklahoma*, 238 NLRB 1438 (1978); *Interstate Motor Freight System*, supra; *St. Petersburg Limo Service*, 223 NLRB 209 (1976); *Spector Freight Systems*, 216 NLRB 551 (1975); *Greyhound Airport Services*, 189 NLRB 291 (1971); *Eastern Greyhound Lines*, supra.

¹¹*National Livery Service*, 281 NLRB 698 (1986); *Bay Area-Los Angeles Express*, supra; *Sherwood Trucking Co. v. NLRB*, 774 F.2d 744 (6th Cir. 1985); *Humes Electric*, 263 NLRB 1238 (1982), enf. 715 F.2d 468 (9th Cir. 1983); *B. P. Oil, Inc.*, supra; *Fisher Foods, Inc.*, supra; *Western Union Co.*, supra; *Southwest Airlines*, supra; *John Cuneo of Oklahoma*, supra; *A-1 Bus Lines*, 232 NLRB 665 (1977); *Interstate Motor Freight Systems*, supra; *St. Petersburg Limo Service*, supra; *Spector Freight Systems*, supra; *Greyhound Airport Services*, supra; *Eastern Greyhound Lines*, supra.

e. *Solo performance, supervisor ratio, higher pay*

The evidence establishes during the early morning hours before the regular walker and biker dispatchers reported for duty, Lloyd was not present to supervise Haas and the walker-biker messengers' performance, that Lloyd was the sole supervisor of approximately 15 biker messengers, 2 regular dispatchers, and 1 relief dispatcher (Haas), and Haas was paid a salary while the biker messengers were paid a percentage of the Respondent's charge for their deliveries and pickups.

The Board has held when an employer has instituted parameters for dispatch and similar operations, the fact the employee conducting those operations is alone for limited periods during his workshift is immaterial, and not controlling, in the determination of whether that employee is a supervisor within the meaning of Section 2(11) of the Act;¹² that the fact the ratio of employees is as high as that between Lloyd and the employees he supervised and the fact an employee receives higher pay than those he assigns or directs likewise is not controlling, absent of proof of the exercise of supervisory functions by the employer within the meaning of Section 2(11).¹³

f. *Conclusion*

On the basis of the foregoing, I find and conclude the Respondent failed to meet his burden of proving at times pertinent Haas was a supervisor within the meaning of Section 2(11) of the Act and find, to the contrary, at all pertinent times, Haas was an employee of the Respondent within the meaning of Section 2(3) of the Act.

2. *Quit or discharge*

Following Haas' March 30 conversation with Finnegan, Lloyd told Haas he almost had fired him while hearing what Haas was saying to Finnegan; following Haas' defensive rejoinder he was only advising Finnegan of her rights under the agreement and his dismay at Lloyd's lying to her about his plans for the biker messengers, Lloyd Haas he could leave the Respondent's employ if he did not like the way Lloyd was running the business; and following Haas' apparent conclusion that meant he was discharged and complaining he and others were being fired before they qualified for benefits, Lloyd responded by ordering Haas to get out.

In my judgment, Haas correctly interpreted Lloyd's statement he could leave if he did not like the way Lloyd was running the walker/biker messenger section as a discharge, in the context of the previous exchanges between the two. In addition, I find and conclude Haas' reply to that statement was not a quit, but rather the statement of a future intention, i.e., of a plan to quit after he qualified to receive health benefits and after he completed some dental work. Finally, it is clear Lloyd's final order to Haas, i.e., to "get out" was clearly and unequivocally a discharge.

I therefore find and conclude on March 30 the Respondent, by Lloyd, discharged Haas, that he did not voluntarily quit his employment.

¹² *Bay Area-Los Angeles Express*, supra; *Fisher Foods, Inc.*, supra; *Interstate Motor Freight System*, supra; *Spector Freight Systems*, supra.

¹³ *Eastern Greyhound Lines*, supra; *Humes Electric*, supra.

3. *Concerted, protected activities*

Findings and conclusions have been entered above employee Haas was discharged on March 30. Findings have been entered earlier Lloyd discharged Haas for describing to employee Finnegan the advantages and protections the agreement between the Respondent and the Union would provide to her once she completed probation and urging Finnegan to remain on the job and refrain from commencing her leave of absence until she had completed her probationary period.

Under Section 8(a)(1) of the Act it is an unfair labor practice for an employer to interfere with, coerce, or restrain an employee in the exercise of his or her right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In *City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court expressed its approval of the Board doctrine acts or statements by individual employees constituted "concerted activity" within the meaning of the Act when an objective of the act or statement was to induce or initiate actions beneficial to other employees, as well as he or she.

In *Meyers Industries.*, 281 NLRB 882 (1986) (*Meyers II*),¹⁴ the Board spelled out the principles it would apply to statements by an individual employee alleged to constitute "concerted activities" protected by Section 8(a)(1) of the Act, by quoting with approval (at p. 887) the following language of the Third Circuit Court in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (1964):

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

City Disposal affirmed the principle employee invocation of a right, protection or benefit established by a collective-bargaining agreement between an employer and the labor organization involves the interests of other employees and therefore attempted invocation of such a right, protection or benefit constitutes a concerted activity for mutual aid or benefit. A line of cases also establishes the rule employee discipline or discharge for discussing with other employees subjects affecting employment interferes with, restrains and coerces each discussant in the exercise of his or her right to engage in concerted activity for mutual aid or benefit.¹⁵

In *Jhirmack*, supra, Chairman Dotson, in a concurring opinion, stated in view of the fact the discriminatee was discharged for advising a coworker other employees were complaining about his work performance to aid the coworker (by motivating him to improve his job performance and keep his job) supported the conclusion the participation of two employees constituted concerted activities for mutual aid or protection within the meaning of the Act and therefore *Meyers II* and its progeny were inapplicable.

¹⁴ Affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

¹⁵ U.S. Furniture Industries., 293 NLRB 159 (1989); *Jhirmack Enterprises*, 283 NLRB 609 (1987); *El Gran Combo*, 284 NLRB 1115 (1987), affd. 853 F.2d 996 (1st Cir. 1988); *Scientific Atlanta*, 278 NLRB 622 (1986); *O'Hare Hilton*, 248 NLRB 255 (1980); *Pioneer Natural Gas Co.*, 253 NLRB 17 (1980); *General Motors Corp.*, 239 NLRB 34 (1978).

Haas' remarks to Finnegan were for the purpose of inducing her to remain on the job long enough to secure protections, benefits and rights afforded employees who completed the probationary period established in the agreement between the Respondent and the Union. I find by so doing, Haas was engaged in concerted activities for mutual aid or protection and therefore the Respondent violated Section 8(a)(1) of the Act by discharging Haas for that effort.

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Lloyd was a supervisor and agent of the Respondent acting on its behalf within the meaning of the Act.

3. At all pertinent times Haas was an employee within the meaning of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by discharging Haas for engaging in concerted activities protected by the Act.

5. The aforesaid unfair labor practice affected commerce as defined in the Act.

THE REMEDY

Having found the Respondent engaged in an unfair labor practice, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act.

Having found the Respondent discriminatorily discharged Haas, I recommend the Respondent be directed to immediately reinstate Haas to his former position or, if that position is not available, to an equivalent position, with all seniority and other rights and privileges restored, and to make Haas whole for any wage and benefit losses he suffered by virtue of the discrimination practiced against him, less any interim earnings, with the amounts due and interest computed in accordance with the formulae of *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

¹⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as

ORDER

The Respondent, Express Messenger Systems, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from disciplining its employees for disseminating information concerning protections and benefits available to them by virtue of their employment and urging them to take action designed to secure such protections and benefits.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to Karl Haas to his former job or, if that job no longer exists, to equivalent employment with all seniority and other rights, benefits, and privileges restored.

(b) Make whole Karl Haas for any wage and benefit losses he suffered due to the discrimination practiced against him in the manner set out in the remedy section of this decision.

(c) Remove from its records any references pertaining to Haas' unlawful discharge, informing him in writing this has been done and his unlawful treatment shall not be used against him.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in San Francisco, California, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."